NOS. 14-614, 14-623

In the
Supreme Court of the United States

DOUGLAS R. M. NAZARIAN, *et al.*,
Petitioners,
v.
PPL ENERGYPLUS, LLC, *et al.*,
Respondents.

CPV MARYLAND, LLC,
Petitioner,
v.
PPL ENERGYPLUS, LLC, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
CANDICE C. WONG
BANCROFT PLLC
1919 M Street NW, Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com
Counsel for Respondents
(Additional Counsel Listed on Inside Cover)

February 11, 2015

TAMARA LINDE
Executive Vice President
and General Counsel
PSEG SERVICES CORP.
80 Park Plaza
Newark, NJ 07102

SHANNEN W COFFIN
STEPTOE &
JOHNSON LLP
1330 Connecticut Ave. NW
Washington, DC 20036
Counsel for
PSEG Power, LLC

JESSE A. DILLON
Assistant General Counsel
PPL SERVICES CORP.
Two N. Ninth Street
Allentown, PA 18101

DAVID L. MEYER
MORRISON & FOERSTER
2000 Pennsylvania Ave. NW
Suite 6000
Washington, DC 20006
Counsel for
The PPL Companies

DAVID MUSSELMAN
Associate General Counsel
ESSENTIAL POWER, LLC
150 College Road West
Princeton, NJ 08540
Counsel for
Essential Power, LLC

QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that a novel state scheme that guarantees a generator a price different from the price approved by the Federal Energy Regulatory Commission ("FERC") for its electricity and capacity sales into the federally regulated wholesale market intrudes upon FERC's exclusive jurisdiction over rates "received ... for or in connection" with wholesale sales. 16 U.S.C. §824d(a).

PARTIES TO THE PROCEEDING

Petitioners are CPV Maryland, LLC; and the Chairman and Commissioners of the Maryland Public Service Commission (at the time of the relevant orders, Douglas R.M. Nazarian, Harold Williams, Lawrence Brenner, Kelly Speakes-Backman, and W. Kevin Hughes), who were sued in their official capacities as Chairman.

Respondents are PPL EnergyPlus, LLC, PPL Brunner Island, LLC, PPL Holtwood, LLC; PPL Martins Creek, LLC, PPL Montour, LLC, PPL Susquehanna, LLC, Lower Mount Bethel Energy, LLC, PPL New Jersey Solar, LLC, PPL New Jersey Biogas, LLC, and PPL Renewable Energy, LLC; Public Service Electric and Gas Company (PSEG Power LLC); and Essential Power, LLC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, respondents state:

PPL EnergyPlus, LLC; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; Lower Mount Bethel Energy, LLC; PPL New Jersey Solar, LLC; PPL New Jersey Biogas, LLC; and PPL Renewable Energy, LLC ("PPL Parties"), are wholly-owned, indirect subsidiaries of PPL Corporation, a publicly traded corporation. No other publicly-held company has a 10% or greater ownership interest in the PPL Parties or PPL Corporation.

Public Service Electric and Gas Company ("PSE&G") is a wholly-owned subsidiary of Public Service Enterprise Group Incorporated, a publicly traded corporation. No other publicly held company has a 10% or greater ownership interest in Public Service Electric and Gas Company or Public Service Enterprise Group Incorporated.

Essential Power, LLC, formerly known as North American Energy Alliance, LLC, is a Delaware limited liability company. No publicly held corporation holds an interest in Essential Power, LLC.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
CORPORATE DISCLOSURE STATEMENT iii
TABLE OF AUTHORITIES v
INTRODUCTION 1
STATEMENT OF THE CASE 3
A. Federal Regulatory Background 3
B. The Rapid Expansion of the Federal Wholesale Market 5
C. PJM and the Reliability Pricing Model 7
D. Maryland's Generation Order 10
E. Procedural Background 12
REASONS FOR DENYING THE PETITIONS 15
I. This Factbound, Splitless Case Does Not Merit This Court's Review 15
A. The Carefully Circumscribed Decision Below Accords With Well-Settled and Unchallenged Preemption Principles 15
B. The Decision Accords With FERC's View 18
C. Petitioners' Pleas for Error Correction Recycle Arguments That Were Soundly Rejected Below 21
II. The Decision Below Is Consciously Narrow And Lacks Exceptional Importance 28
CONCLUSION 32

TABLE OF AUTHORITIES

Cases

Arizona v. United States,
132 S. Ct. 2492 (2012) 25

Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n,
461 U.S. 375 (1983) 25

Atl. City Elec. Co. v. FERC,
295 F.3d 1 (D.C. Cir. 2002) 21, 22

Conn. Dep't of Pub. Util. Control v. FERC,
569 F.3d 477 (D.C. Cir. 2009) 22, 23

Graver Tank & Mfg. Co. v. Linde Air Prods. Co.,
336 U.S. 271 (1949) 16

Gulf States Utils. Co. v. FPC,
411 U.S. 747 (1973) 4

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 18

Miss. Indus. v. FERC,
808 F.2d 1525 (D.C. Cir. 1987) 5

Miss. Power & Light Co. v. Mississippi ex rel. Moore,
487 U.S. 354 (1988) 24

Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.,
554 U.S. 527 (2008) 25

N.J. Bd. of Pub. Utils. v. FERC,
744 F.3d 74 (3d Cir. 2014) 20

New York v. FERC,
535 U.S. 1 (2002) 3, 5

PPL EnergyPlus, LLC v. Solomon,
766 F.3d 241 (2014) 14

Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.,
273 U.S. 83 (1927) 4

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984) 25

Statutes

16 U.S.C. §824(a) 15

16 U.S.C. §824(b) 4, 5

16 U.S.C. §824d(a) ..... *passim*

16 U.S.C. §824e 4

Other Authorities

Entergy Servs., Inc.,
120 FERC ¶61,020 (2007) 25

Jeff Newman, *CPV breaks ground on gas plant*, Gazette.Net (Dec. 3, 2014) 31

PJM Interconnection, L.L.C.,
126 FERC ¶61,275 (2009) 10, 17

PJM Interconnection, L.L.C.,
128 FERC ¶61,157 (2009) 9, 10

PJM Interconnection, L.L.C.,
137 FERC ¶61,145 (2011) 20

PJM Tariff 4.6(a) 26

Appellees' Br., *PPL EnergyPlus, LLC v. Solomon*, No. 13-4330
(3d Cir. Feb. 18, 2014) 28

U.S. Br., *PPL EnergyPlus, LLC v. Solomon*, No. 13-4330 (3d Cir. Mar. 20, 2014) 19

S.B. 400, 2007 Reg. Sess. (Md.), http://perma.cc/z6py-qzhe 10

INTRODUCTION

This case involves an avowedly narrow decision resolving a factbound preemption question on which there is no division in authority. Indeed, although New Jersey and Maryland embarked on a similar course that was challenged in cases on parallel tracks through the Third and Fourth Circuits, the unanimous judgment of all four courts—two district and two circuit—and all eight judges who have weighed in on the issue is that the novel state-mandated contractual mechanisms adopted by New Jersey and Maryland are preempted. As the courts have all recognized, these naked efforts to guarantee in-state generators a price for wholesale electricity sales into the federally regulated wholesale market that is different from the rate set by the prevailing federal regulatory mechanisms are squarely preempted by FERC's exclusive jurisdiction over wholesale rates. That conclusion is a straightforward application of the unremarkable proposition that, even when it comes to matters within the states' legitimate authority, such as regulating or incentivizing generating facilities, means matter as well as ends. And whatever else a state may do to encourage new generation, it may not dictate the rates and terms of wholesale sales.

In fact, petitioners do not even dispute that legal principle; instead, they just fight the premise that Maryland actually set wholesale rates. But the courts below resolved that dispute in respondents' favor for good reason: By forcing in-state utilities to guarantee a new generator a rate fixed by the state for each unit of electricity or capacity that it sells into the interstate

wholesale market for 20 years—regardless of the prices set by that market through its FERC-approved auction mechanism—Maryland simply replaced FERC's rates and terms with ones more to its liking. Moreover, Maryland made no secret about the fact that it guaranteed a preferred generator this fixed, long-term price in an effort to "improve" on a federal marketplace with which the state was dissatisfied. Indeed, the state resorted to this measure only after FERC explicitly rejected its request to adopt the very same long-term pricing guarantee mechanism as a federal regulatory solution. It does not take an "extravagant" view of the Federal Power Act to recognize that it preempts this direct and transparent incursion on FERC's exclusive authority over rates "received ... for or in connection with" wholesale sales.

That does not mean that states are without tools to incentivize new generation. States retain substantial latitude in such matters—including latitude to retreat from the federal wholesale market entirely if they no longer believe that it is serving their interests. FERC itself stressed this point in its *amicus* brief before the Third Circuit opining that this particular form of state action is preempted, and every court to consider this issue has been at pains to emphasize the same. Petitioners' dire warnings that the decision below endangers a laundry list of other incentive schemes thus falls flat. Indeed, the Fourth Circuit explicitly disclaimed any effort to pass judgment on the myriad other programs to which petitioners have sought to analogize throughout this litigation. Instead, the court simply reiterated that, whether for the best of reasons, the worst of reasons, or any reason in between, states simply do not have

the authority to set the rates and terms of wholesale transactions. That manifestly correct conclusion does not warrant this Court's review.

STATEMENT OF THE CASE

A. Federal Regulatory Background

Historically, state electricity markets were "vertically integrated," meaning utilities were responsible both for delivering electricity to customers and for generating the electricity that they delivered. *See New York v. FERC*, 535 U.S. 1, 5 (2002). Because their operations were almost exclusively intrastate, these vertically integrated markets were heavily regulated by states, which set the rates that a utility could charge retail customers based on costs the utility incurred in generating, transmitting, and delivering electricity.

Because electricity demand fluctuates at different times of year, an electricity supplier must be equipped to serve not just relatively static demand, but also significantly increased demand during peak periods. Traditionally, vertically integrated utilities did this by building generating plants intended to operate only when demand was at its peak—even if that meant they operated as little as 20 or 30 hours a year. The obvious inefficiencies of numerous companies with underutilized peak generating facilities soon led utilities to look for ways to sell excess electricity to each other, in hopes of diminishing costs attributable to too many plants spending most of the year idle. To facilitate this "wholesale" market, utilities began building high voltage transmission lines across which electricity could be transferred from utility to utility for ultimate retail sale.

As these wholesale transactions began to cross state lines, the question arose whether states had authority to regulate them, or whether the dormant Commerce Clause reserved this nascent interstate market to the federal government. This Court answered that question in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 89 (1927). Reasoning that these wholesale transactions are "fundamentally interstate from beginning to end," the Court concluded that the dormant Commerce Clause prohibited states from regulating them, and held that such regulation could come only from "exercise of the power vested in Congress." *Id.* at 89-90.

Congress responded with the Federal Power Act of 1935 ("FPA"), which established a new federal agency (then the Federal Power Commission, now FERC) charged with providing "effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758 (1973). Section 201(b) of the FPA grants FERC exclusive jurisdiction over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce," including the power to determine what "rates and charges made, demanded, or received ... for or in connection with the transmission or sale" of electricity at wholesale are "just and reasonable." 16 U.S.C. §§824(b), 824d(a), 824e.

Section 201(b) further provides that FERC has jurisdiction over "all facilities for such transmission or sale of electric energy, but shall not have jurisdiction,

except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." *Id.* §824(b)(1) (emphasis added). That proviso underscored that Congress recognized the interrelationship between in-state generation and interstate sales and transmission; while Congress preserved traditional state authority over generation and intrastate transmission, it consciously subordinated state authority to FERC's power to regulate interstate transmissions and wholesale sales. *See Miss. Indus. v. FERC*, 808 F.2d 1525, 1545 n.74 (D.C. Cir. 1987) ("[FERC] has been awarded jurisdiction over generation facilities 'to the extent provided in other sections,' including jurisdiction necessary to effectuate regulation of interstate wholesale rates").

B. The Rapid Expansion of the Federal Wholesale Market

Although the wholesale market continued to expand modestly over the years, it remained largely ancillary to the traditional vertically integrated regime. That began to change, however, in recent decades with several federal initiatives that forced the vertically integrated utilities that owned the interstate transmission lines to provide wholesale generators with access to those lines on a non-discriminatory basis. *See generally New York*, 535 U.S. at 6-10. These and other regulatory measures

paved the way for explosive growth in wholesale transactions over the past two decades.

As this expanded wholesale marketplace took shape, states began to question whether vertical integration still made sense. Many (but by no means all) states ultimately opted to restructure their electricity industries by disentangling their utilities' generation, transmission, and distribution functions and ordering utilities to open their distribution networks to competitors. By allowing generators to sell the bulk of their electricity into, and retail suppliers to purchase the bulk of their electricity out of, the interstate wholesale market, these states reaped the benefits of lower prices resulting from a more competitive market. At the same time, by rendering their local electricity markets largely dependent on the federally regulated wholesale market, states necessarily ceded much of their traditional regulatory authority.

In 1999, Maryland embraced this new model. Through the Electric Customer Choice and Competition Act, it restructured its market so that electricity sold in Maryland would be purchased from the interstate wholesale market, rather than generated by vertically integrated utilities. Consumers, in turn, would "benefit more from a competitive market for their electricity rather than being captive to a single utility that had a monopoly on their electricity service." PX606 at 36 (PSC Order No. 81423). Regulated utilities known as electric distribution companies ("EDCs") now purchase electricity at wholesale and resell and deliver it to consumers over local distribution networks.

The significance of its decision to do away with vertical integration was not lost on Maryland. By spinning off its "utilities' generating assets," Maryland ensured that "electricity previously subject to traditional rate-of-return regulation (in which the PSC set the utility's profit through a state regulatory proceeding) would now be purchased ... in the federally regulated wholesale electricity market." PX391 at 10 (2007 PSC Interim Report). And by relying on the wholesale market, the state anticipated that it would no longer "evaluate the need for new generation stations in Maryland", "that need is determined by the marketplace" instead. JA248. In short, the state consciously opened itself up not just to the "benefit [of] a competitive market," PX606 at 36, but also to the risks of participation in a federal market that the state could not regulate.

C. PJM and the Reliability Pricing Model

As the interstate wholesale market expanded, FERC encouraged participants to organize regional transmission organizations ("RTOs") to facilitate wholesale market operations in large portions of the country. PJM Interconnection, LLC, ("PJM") is the RTO that operates the wholesale market for a region comprising all or part of 13 states, including Maryland, and the District of Columbia. Subject to FERC's oversight and approval, PJM ensures that its wholesale market will supply all retail sellers within PJM enough electricity to meet consumer demand.

Among other things, PJM operates a wholesale electricity market in which generation resources sell electricity to PJM. PJM then sells that electricity to load serving entities ("LSEs"), which resell it to

consumers to meet energy demands. To participate in this market, generation resources bid their electricity into a market for delivery either in the next hour or the next 24 hours. PJM then accepts bids from lowest to highest until it has enough electricity The highest bid PJM must accept to satisfy the region's needs becomes the "market clearing price." Each resource that bid at or below that price will be paid the market clearing price for all of its electricity, even if its bid was lower.

PJM also operates a market for "capacity"—that is, for the option to buy electricity to satisfy future demand. To ensure that sufficient capacity will be available throughout the region, PJM employs an auction mechanism known as the reliability pricing model ("RPM"). RPM's central feature is a competitive auction that PJM holds annually for a year three years in the future. PJM determines how much capacity the region will need for the relevant year, then holds an auction at which sellers commit to sell, and PJM commits to purchase, the targeted amount from all types of generation resources for subsequent resale to retail suppliers. The capacity auction operates much like the hourly and daily electricity markets, with PJM accepting bids from lowest to highest until it has the requisite capacity, and making the highest bid accepted the market clearing price. Each capacity resource that cleared the market must sell PJM all the capacity it bid, and, in return, will get paid the market clearing price for all of that capacity. This forward market is designed to provide price signals that encourage new generation three years in advance (which is sufficient time to construct a new generating facility).

In both its electricity and its capacity markets, PJM uses a pricing model that is designed to "reflect[] the value of the energy at the specific location and time it is delivered," as well as "the effect of actual operating conditions." PX516 at 11. The clearing price may be higher, for instance, in a zone where transmission lines are congested, and generating facilities will receive higher revenues for servicing those areas. These different prices for different zones are designed to establish "price signals that encourage new generation sources to locate in areas where they will receive higher prices," thereby reducing the impact of congestion on prices. *Id.* Relying on these signals, generation companies make decisions about how much capacity development or transmission planning is needed, what sources will provide that new electricity, and where new power plants will be located.

FERC recognizes that, in certain circumstances and areas, the auction's price signals alone may be insufficient to incentivize new generation in certain areas. To address those circumstances within the PJM market construct, PJM established, and FERC approved, the new entry price adjustment ("NEPA") for new resources that satisfy specific size and locational conditions. The NEPA provides a special three-year revenue guarantee to the new resources in an effort to "provide support to the new entrant until sufficient load growth would be expected to" do so. *PJM Interconnection, L.L.C.*, 128 FERC ¶61,157, at ¶101 (2009). The NEPA is the one exception to PJM's general policy of non-discrimination—*i.e.*, of seeking to obtain the most cost-effective electricity, whether it comes from new resources or existing ones. *See id.*

¶102 ("Both new entry and retention of existing efficient capacity are necessary to ensure reliability").

D. Maryland's Generation Order

Although Maryland voluntarily abandoned vertical integration to reap the benefits of the federal wholesale market, within a few years, it began to voice concerns that PJM's price signals were doing too little to encourage new generation in Maryland and keep prices down for Maryland consumers. Accordingly, Maryland's legislature passed a law requiring the state's public service commission ("PSC") to "consider changes"—including a possible return to vertical integration—designed to provide consumers reliable electricity "at the best possible price." S.B. 400, 2007 Reg. Sess. (Md.), http://perma.cc/z6py-qzhe.

Rather than advocate a return to vertical integration, the PSC attempted to convince FERC to revise the PJM market to provide the longer-term investment horizon that the PSC preferred. Specifically, the PSC asked FERC to expand the NEPA's three-year price guarantee to at least ten years. FERC explicitly rejected Maryland's proposal. *PJM Interconnection, L.L.C.*, 126 FERC ¶61,275, at ¶146 (2009). Although it "recognize[d] that a longer commitment period may aid the developer in financing a project," FERC concluded that "giving new suppliers longer payments and assurances unavailable to existing suppliers" would upset the market's "balance" between new and existing generation and "long-term forward price signals." *Id.* ¶¶149-50; *see also id.* ¶150 (auction "was designed to provide long-term forward price signals and not necessarily long-term revenue assurance").

At that point, Maryland decided to take matters into its own hands, seeking to incentivize new in-state generation by directing utilities to enter into contracts that would guarantee new generators fixed revenues for a period much longer than PJM does. To that end, in 2011, the PSC issued a request for proposals to build a new generating facility. The request required the winning bidder to agree to build in Maryland a new gas-fired facility that would sell all of its electricity and capacity into the PJM market. In return, it guaranteed the winning bidder something it called a "Fixed/Indexed Pricing Contract for Differences." This pricing contract is not a contract with the state itself. Rather, it is a contract that the PSC orders Maryland's EDCs (the private companies that deliver electricity to end-users) to enter into, and it guarantees the new generator a fixed, 20-year revenue stream for all electricity and capacity that it sells to PJM.

Under the pricing contract, the EDCs are obligated to ensure that the new generator receives this state-set "contract price"—regardless of what the PJM market clearing price may be—"for each unit of energy and capacity [that it] sells to PJM in the PJM Markets" for 20 years. JA264. The contract payments are explicitly conditioned on the sale of the generator's capacity in the PJM market: If the state-set "contract price" is higher than the PJM price, the EDCs must pay the new generator the difference for each unit of electricity and capacity that the generator actually sells into the PJM market. If the new generator fails to clear the PJM market and sells nothing to PJM, the EDC is not required to pay anything. The EDCs may pass along any costs or credits achieved to ratepayers.

The PSC received three proposals and ultimately selected only CPV's. The state then issued an order compelling each of the state's EDCs to execute a 20-year pricing contract with CPV, which each did under protest.

E. Procedural Background

Respondents are generating companies that, as a result of Maryland's actions, suffered suppressed PJM prices and reduced revenues for their sales in the PJM markets and were forced to forgo certain investments in new generating assets. Accordingly, respondents challenged Maryland's actions in the U.S. District Court for the District of Maryland. After a six-day trial that included extensive presentation of evidence and testimony, the district court agreed with respondents that Maryland's state-mandated pricing contract intrudes upon FERC's exclusive jurisdiction over the wholesale market because it "establishes the price ultimately received by CPV for its actual physical energy and capacity sales to PJM in the PJM Markets." Pet.App.113a.[1]

In a unanimous opinion authored by Judge Wilkinson, the U.S. Court of Appeals for the Fourth Circuit quickly affirmed. The court first dismissed the state's argument that it lacked jurisdiction to consider respondents challenge the generation order or the pricing contracts. Pet.App.13a n.1. The court then agreed with the District Court that Maryland's action are preempted. As the court explained, "[a]lthough states plainly retain substantial latitude in directly

---

[1] Unless otherwise noted, all Petitioner-Appendix citations are to the CPV petition's appendix in No. 14-623.

regulating generation facilities, they may not exercise this authority in a way that impinges on FERC's exclusive power over wholesale rates." Pet.App.20a. The court held that Maryland's pricing contract does just that, as it "functionally sets the rate that CPV receives for its sales in the PJM auction" and "supersedes the PJM rates that CPV would otherwise earn." Pet.App.17a, 19a; *see also* Pet.App.19a (pricing contract "ensures that CPV receives a fixed price for every unit of energy and capacity it sells in the PJM auction, regardless of the market price"). As the court put it: "Maryland has chosen to incentivize generation by setting interstate wholesale rates. This particular choice of means is impermissible." Pet.App.21a.

The court also concluded that "principles of field and conflict preemption in this case are mutually reinforcing," as Maryland's pricing contract not only displaces wholesale rates approved by FERC, but also "disrupts [PJM's price-signal] scheme by substituting the state's preferred incentive structure for that approved by FERC." Pet.App.21a, 23a. The contract does so by guaranteeing CPV a fixed price for its sales to PJM *for 20 years*, even though FERC explicitly rejected Maryland's proposal to expand NEPA's *three*-year guarantee for new generators as inconsistent with its policy of non-discrimination between new and existing generation. Pet.App.23a-24a. By providing its own 20-year pricing guarantee, the court explained, Maryland "sought to achieve through the backdoor of its own regulatory process what it could not achieve through the front door of FERC proceedings." Pet.App.24a. "Circumventing and displacing federal rules in this fashion is not permissible." Pet.App.24a.

In reaching those conclusions, the Fourth Circuit repeatedly stressed "the limited scope of [its] holding, which is addressed to the specific program at issue." Pet.App.21; *see also* Pet.App.24a. As the court reiterated in declining to opine on the validity of a variety of programs to which petitioners sought to analogize, "[i]t goes without saying that not 'every state statute that has some indirect effect' on wholesale rates is preempted." Pet.App.21a. Here, "however, the effect ... on matters within FERC's exclusive jurisdiction is neither indirect nor incidental," as the pricing contract "strikes at the heart of the agency's statutory power to establish rates for the sale of electric energy in interstate commerce." Pet.App.21a. Whatever else states may do to incentive generation, the court concluded, that particular choice of means "is simply a bridge too far." Pet.App.25a.

The Fourth Circuit's decision was reinforced a few months later by a unanimous decision of the U.S. Court of Appeals for the Third Circuit holding a nearly identical scheme adopted by New Jersey—a state that had joined Maryland in its unsuccessful effort to convince FERC to modify its own regulatory scheme—preempted by FERC's exclusive jurisdiction over wholesale rates. *See PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (2014) (petitions for *certiorari* in Nos. 14-634 and 14-694 pending). The Third Circuit reached that conclusion after soliciting the views of the federal government, which agreed that New Jersey's scheme encroaches on FERC's exclusive jurisdiction. In its brief taking that position, FERC specifically noted the close resemblance of the Maryland scheme.

REASONS FOR DENYING THE PETITIONS

I. This Factbound, Splitless Case Does Not Merit This Court's Review.

A. The Carefully Circumscribed Decision Below Accords With Well-Settled and Unchallenged Preemption Principles.

Petitioners ask this Court to review a consciously "narrow" decision, Pet.App.24a, applying settled legal principles to a novel state scheme. Petitioners do not and cannot claim any division of authority on whether that scheme is preempted by federal law, as every court—indeed, every judge—to consider the question has agreed that the scheme is preempted. As challenges to the New Jersey and Maryland pricing schemes have made their way through the federal courts, eight judges out of eight have found the laws preempted, and the pleas for *en banc* review of those decisions were denied without dissent. None of this is surprising. There may well be some difficult questions about the overlap between state authority over generation and federal authority over wholesale rates. But whether a state may avowedly provide in-state generators a different and more stable wholesale rate than prevails on the federally regulated wholesale market is not one of them.

It is beyond cavil that FERC has exclusive regulatory power over the field of interstate wholesale electricity sales. The FPA expressly grants FERC jurisdiction over "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. §824(a). That broad authority encompasses exclusive jurisdiction to regulate "rates and charges made,

demanded, or received ... for or in connection with" interstate wholesale transactions. *Id.* §824d(a). In sum, "the text and structure of the FPA ... unambiguously apportion[] control over wholesale rates to FERC." Pet.App.22a. That principle is so settled that even petitioners readily concede that "States may *not* ... *set* the price ... at which electricity or capacity is sold at wholesale." CPV-Pet.11.

Petitioners' principal dispute is instead with the lower courts' *factual* finding that Maryland's novel pricing scheme did indeed set wholesale rates—hardly a promising basis for seeking this Court's review. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (this Court does not "review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"). But petitioners' arguments are readily refuted by the pricing contract itself. On its face, the contract "ensures that CPV receives a fixed price for every unit of energy and capacity it sells in the PJM auction, regardless of the market price." Pet.App.19a; *see also* JA264. It is difficult to imagine a more clear-cut example of a state determining the rate that a generator "receive[s] ... for or in connection with" its wholesale transactions. 16 U.S.C. §824d(a).

Indeed, the whole point of the pricing contract is to guarantee that CPV's wholesale sales to PJM will be compensated at a price that is different from the market clearing price set by PJM's FERC-approved auction mechanism. Any generator that clears the auction already is entitled to the market clearing price, so the contract makes sense only if it "effectively supplants the rate generated by the auction with an

alternative rate preferred by the state"—which it does. Pet.App.17a. By "adopting terms and prices set by Maryland, not those sanctioned by FERC," this scheme "strikes at the heart of the agency's statutory power to establish [wholesale] rates." Pet.App.21a.

And to make matters worse, Maryland guaranteed CPV this fixed, state-set rate for 20 years even though FERC *expressly* rejected Maryland's request to expand NEPA's three-year fixed revenue guarantee to encourage more new generation. FERC did so out of concern that "giving new suppliers longer payments and assurances unavailable to existing suppliers" would upset the PJM market's careful "balance" between new and existing generation. *PJM Interconnection*, 126 FERC ¶61,275, at ¶¶149-50; *see also id.* ¶150 (auction "was designed to provide long-term forward price signals and not necessarily long-term revenue assurance"). Maryland's scheme thus not only intrudes on an exclusively federal field, but does so in a manner that conflicts overtly with FERC's regulation of that field. As the Court of Appeals correctly concluded, that makes field and conflict preemption principles "mutually reinforcing" here, Pet.App.21a, as Maryland has both interfered with FERC's exclusive authority over wholesale rates and created a "direct and transparent impediment to the functioning of the PJM markets." Pet.App.25a.

In short, the incursion on FERC's authority in this case is "neither indirect nor incidental," but rather is as "direct and transparent" as it could be. Pet.App.21a, 25a. Maryland made no secret of its view that the price signals the FERC-approved PJM market was sending were not doing enough to benefit

Maryland. Indeed, the state candidly acknowledged its view that the "market structures within PJM will never provide the signals or the financial support to build power plants in Maryland." 3/5/13a.m. Tr.12:11-15. Yet rather than exercise its option to retreat from a federal market with which it was displeased, the state took it upon itself to try to fix those perceived deficiencies by changing the rates and terms for CPV's sales in the PJM auction. Worse still, Maryland did so in the face of FERC's explicit refusal to take the substantially similar "corrective" actions when Maryland urged them.

It requires no "'extravagant'" view of FERC's jurisdiction, CPV-Pet.20, to recognize that this "is simply a bridge too far." Pet.App.25a. To be sure, "states plainly retain substantial latitude in directly regulating generation facilities" and incentivizing their creation. Pet.App20a. But means matter as well as ends. And states simply do not have the power "to incentivize generation by setting interstate wholesale rates." Pet.App.21a. The decision below does nothing more than reaffirm that unremarkable proposition.

B. The Decision Accords With FERC's View.

The decision below accords not only with settled preemption principles, but with FERC's own view. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495-96 (1996) ("the federal agency to which Congress has delegated its authority ... is uniquely qualified to determine whether a particular form of state law ... should be pre-empted"). Petitioners conspicuously fail to mention that FERC, before the Fourth Circuit's decision, already weighed in on this very mechanism

for incentivizing new generation resources and opined that it is preempted.

Although FERC was not a party to this case or the parallel New Jersey proceeding, the Third Circuit invited the federal government to submit a brief providing its views on whether New Jersey's materially analogous scheme is preempted. In a brief that was brought to the Fourth Circuit's attention through a 28(j) letter and explicitly referenced Maryland's "similar program," FERC opined in no uncertain terms that New Jersey's scheme is preempted by federal law. By "tying the subsidy explicitly and directly to ... wholesale rates," FERC explained, New Jersey's scheme marks an "intrusion upon the Commission's exclusive jurisdiction to regulate wholesale rates and practices 'affecting' rates." U.S. Br.5 n.3, 14-15, *PPL EnergyPlus, LLC v. Solomon*, No. 13-4330 (3d Cir. Mar. 20, 2014). In doing so, however, FERC made a point of reiterating that "states have numerous ways to incentivize construction of new generation facilities that do not directly affect the setting of FERC-jurisdictional wholesale rates." *Id.* at 18.

Remarkably, petitioners nonetheless continue to suggest that FERC actually *endorsed* Maryland's (and New Jersey's) scheme when it made various revisions to PJM's "minimum offer price requirements" in anticipation of the participation of state-subsidized generators like CPV *See* State-Pet.17-18; CPV-Pet.29. But the minimum offer price requirements address wholly distinct issues about the price at which a new generator may bid *into* PJM's auction—not whether states may supplement the price that

generators may *receive* for or in connection with those sales. As the Fourth Circuit noted, moreover, "FERC's own comments on the subject belie [petitioners'] claim that the agency has affirmatively approved the Generation Order." Pet.App.24a. For example, FERC's orders specifically disclaimed any "intent ... to pass judgment on state and local policies and objectives with regard to the development of new capacity resources." *PJM Interconnection, L.L.C.*, 137 FERC ¶61,145, at ¶3 (2011). And, of course, "[t]he fact that FERC was forced to mitigate the Generation Order's distorting effects" with its revisions to the minimum offer price rule "tends to confirm rather than refute the existence of a conflict." Pet.App.24a. All of that readily explains why the Third Circuit, which had just issued a lengthy decision upholding the minimum offer price rule, *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014), gave no more credence to this flawed argument than the Fourth Circuit did when the New Jersey petitioners raised it before that court.

In any event, there is no need to guess at FERC's views on the question. When asked to weigh in, FERC was crystal clear: No matter its motivation, a state may not manipulate prices in the federally regulated wholesale market. Petitioners' contrary view thus has been refuted not only by every judge to consider it, but by the federal agency that oversees that market.[2]

---

[2] In suggesting that the decision below "prevented FERC from reviewing [the pricing contracts] to determine whether they are just and reasonable," CPV-Pet.35 & n.34, CPV ignores the fact that it *chose* not to seek FERC review of the contracts until after

C. Petitioners' Pleas for Error Correction Recycle Arguments That Were Soundly Rejected Below.

Petitioners' continued efforts to find fault with the decision below succeed only in revealing that they, not the courts below, suffer from "basic misunderstandings about the FPA regulatory framework." CPV-Pet.24. Moreover, petitioners' strained attempts to recast the pricing contracts as various things they are not were thoroughly considered and rejected by both courts below after careful consideration of an expansive trial record.

At the outset, to the extent petitioners attempt to manufacture some sort of circuit split, their efforts are unavailing—as evidenced by the fact that they cannot even seem to agree on the decisions with which the one below purportedly conflicts. Maryland offers up *Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002), a case that CPV never even bothers to cite—and that the state itself cited only once in its briefing below, for a point having nothing to do with the one raised here. But *Atlantic City* addressed the altogether different question of whether FERC may compel utilities who agree to let PJM use their transmission lines to cede their statutory rights to file "changes in rate design" for the transmission services they provide—even if PJM itself has not made that a condition of their participation. *Id.* at 8. Maryland makes the feeble analogy that because FERC could not

---

they had been invalidated by the courts below. At that point, FERC quite logically concluded that, even setting aside preemption concerns, it could not review contracts that were no longer in force.

force this term upon PJM and its participants, "PJM's tariff could not displace CPV's right to set its own rate for wholesale sales, subject to FERC review." State-Pet.16. But the obvious flaw in this logic is that the PJM clearing price is not *forced* upon CPV by FERC or anyone else; it is simply the price that CPV agreed to receive when it agreed to bid its capacity into the PJM auction.

All of Maryland's talk about CPV's right to "decide the rates and terms on which [it is] willing to sell" electricity and capacity (talk that is noticeably absent from CPV's own petition) is therefore beside the point. State-Pet.12. To be sure, CPV may decide what prices it will accept for the electricity and capacity that it sells to willing buyers. But as petitioners themselves argue, *see* CPV-Pet.24, CPV here sells its electricity or capacity not to any utility, but *to PJM*. And as *Atlantic City* itself makes clear, "utilities may choose to voluntarily give up, by contract, some of their rate-filing freedom." 295 F.3d at 10. That is precisely what CPV does when it opts into the PJM auction. CPV cannot then, at Maryland's direction, opt out of the prices set by the PJM auction for sales *to PJM*.

CPV, for its part, makes much of *Connecticut Department of Public Utility Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009) ("*CDPUC*"), a case that Maryland barely mentions, and that is equally inapposite. *CDPUC* dealt with whether FERC had jurisdiction to review a feature of the New England bulk power system that estimated the target amount of capacity the system would need. Although *CDPUC* at least involved the line between FERC's jurisdiction over wholesale rates and states' jurisdiction over

generation, it resoundingly affirmed that FERC's jurisdiction over capacity rates remains exclusive even when it has the potential to affect generation-related ends. As the court explained, FERC "may *directly* establish prices for capacity ... *even for the express purpose of incentivizing construction of new generation facilities*," and thus likewise has "the power to do so indirectly by setting a target for capacity demand." *Id.* at 482 (emphasis added). If anything, then, *CDPUC* only bolsters the decision below.

Petitioners fare no better with their efforts to portray the decision below as inconsistent with settled distinctions between state and federal power under the FPA. Indeed, once again, petitioners cannot even get on the same page in identifying the purported problem. CPV insists that Maryland's pricing contract does not intrude on FERC's exclusive jurisdiction because it does not set the rate that CPV will receive *from PJM*, but rather sets only the rate that CPV will receive from *the EDCs* for each unit of electricity or capacity that it sells to PJM. *See* CPV-Pet.25. But that crabbed view of FERC's jurisdiction as extending only to the rate paid by the direct purchaser of electricity or capacity is defeated by the plain text of the FPA, which grants FERC jurisdiction over "[a]ll rates and charges made, demanded, *or received* ... for *or in connection with* the ... sale" of electricity at wholesale. 16 U.S.C. §824d(a) (emphasis added). A contract that requires a third party to ensure that a seller receives a particular price for each unit of electricity or capacity that it sells *to PJM* plainly

establishes the "rate" that the seller "receive[s] ... for or in connection with" those wholesale sales.[3]

Maryland, by contrast, takes the decidedly different view that the pricing contracts *do* establish the rate for CPV's wholesale sales, but that the rate they set should be subject to "just and reasonable" review by FERC because it is not set by the state. State-Pet.13. But the courts below resolved that factual dispute in respondents' favor for good reason: The contract price, while initially proposed by CPV as part of a procurement, "became operative only after reviewed, evaluated, and accepted by the PSC in an agency order." Pet.App.110a n.48. Indeed, the chairman of the PSC "testified that the contract price accepted by the PSC in the Generation Order represented a unilateral decision by the PSC, and that ... PSC had reserved the right to select none of the proposed contract prices." Pet.App.110a n.48.

Because Maryland did in fact set the rate at which CPV will be compensated, it cannot avoid preemption

---

[3] As the Court of Appeals noted, that conclusion follows directly not just from the statutory text but also from this Court's decision in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). There, the Court made clear that a state may not use its jurisdiction over retail sales to prevent utilities from recovering from their consumers FERC-mandated rates for their wholesale electricity purchases. *Id.* at 373. Such state interference was "preempted because it denied full effect to the rates set by FERC." Pet.App.18a. *A fortiori*, a state directive that third parties pay generators a different rate for their wholesale sales to PJM denies full effect to the PJM rates approved by FERC. *See* Pet.App.18a ("If states are required to give full effect to FERC-mandated wholesale rates on the demand side of the equation, it stands to reason that they are also required to do so on the supply side.").

by appealing to FERC's power to determine whether rates are just and reasonable. It is black-letter law that "*any* state law falling within [an exclusively federal] field is preempted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). That is so even if the law purports to be "complementary" to federal regulation. *Arizona v. United States*, 132 S. Ct. 2492, 2501-02 (2012). Indeed, it is so even if the federal government has decided not to regulate at all. *See Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 383-84 (1983). By giving FERC exclusive power to determine what wholesale rates are "just and reasonable," 16 U.S.C. §824d(a), Congress necessarily foreclosed efforts by states to engage in their own process of setting or reviewing the reasonableness of wholesale rates—even if FERC might not object to whatever rate a state would set. *See Entergy Servs., Inc.*, 120 FERC ¶61,020, at ¶28 (2007) (reiterating that FERC's "ratemaking obligations under the FPA cannot be delegated to a state").

Petitioners fare no better in seeking to analogize the pricing contracts to bilateral contracts, whether long-term or short-term. *See* CPV-Pet.27-28. Bilateral contracts are contracts between buyers and sellers for the sale of electricity or capacity *from one party to the other*. In other words, they are arms-length transactions between a willing seller and buyer for actual sales of electricity or capacity. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 531, 537 (2008) (bilateral contracts are entered into under tariffs that "simply state that the seller will enter into *freely negotiated contracts with purchasers*" (emphasis added)). Here, by contrast, as CPV itself emphasizes

repeatedly, "Maryland's local utilities *do not purchase electricity or capacity from CPV* under the contracts at issue." CPV-Pet.24 (emphasis added). CPV sells its electricity or capacity *not* to the utility, but to PJM. CPV-Pet.25. Contracts between sellers and *non*-buyers that have merely been obligated by a state to make payments (under protest) to subsidize sales of electricity or capacity *to someone else* are nothing at all like any kind of bilateral contract FERC has approved.

Nor does it help CPV that a party who purchases electricity or capacity through a bilateral contract may proceed to sell that same electricity or capacity into the PJM market. A party that purchases electricity at one price and then sells that electricity into PJM at another has not received two different prices for its sale *to PJM*. As PJM's own rules make clear, "the capacity that is the subject of the [bilateral contract] shall pass to the buyer" and "[i]n no event shall the purchase and sale ... constitute a transaction with [PJM]." PJM Tariff 4.6(a)(i)-(ii). The buyer's subsequent sale to PJM is another electricity or capacity transaction entirely, and, in any event, none of the wholesale prices it pays or receives is set by a state. Here, by contrast, there is only one actual electricity or capacity transaction taking place: the transaction with PJM. The pricing contracts just force the EDCs to ensure that CPV receives a particular rate—and a rate different from PJM's FERC-approved rate—for that transaction. The problem here thus is not that LCAPP generators are receiving more revenue than the PJM auction supplies, *see* CPV-Pet.26; it is that they are doing so even though they

are selling electricity and capacity to no one *other than PJM*.

CPV alternatively attempts to paint the payments under the pricing contracts as payments not for sales of electricity or capacity, but for "new power plant construction." CPV-Pet.22. Once again, that is in the teeth of the factual findings below, as both courts found that those payments "plainly qualify as compensation for interstate sales at wholesale, not simply for CPV's construction of a plant." Pet.App.17a. They could hardly find otherwise given that payments are due under the pricing contracts *only if* CPV physically delivers electricity or capacity to PJM. If CPV constructed a plant but failed to clear PJM, it would get nothing. Unsurprisingly, then, even CPV's own witness agreed that "the financial considerations" in determining the contract price went well "beyond recouping the costs for physically constructing a generation facility," JA293; as he explained, "*physical delivery* of electricity was ... the raison d'etre of going down this path." 3/5/13a.m. Tr.17:18-20 (emphasis added).

At bottom, no creative refashioning can change the fact that Maryland's scheme both by design and intent supplants FERC-approved rates "received ... for or in connection with" wholesale electricity sales to PJM. Whatever else a state may do to incentivize new generation, it may not do that. Pet.App.17a. Nor may it manipulate the terms of wholesale transactions to "achieve through the backdoor of its own regulatory process what it could not achieve through the front door of FERC proceedings." Pet.App.24a. Because Maryland's novel scheme plainly does both, the courts

below held that it is preempted by federal law There is no reason for this Court to disturb that factbound, splitless, and manifestly correct conclusion.[4]

II. The Decision Below Is Consciously Narrow And Lacks Exceptional Importance.

As a straightforward application of settled law to a novel state program—one that deliberately and directly set out to reform a market over which FERC concededly has exclusive regulatory jurisdiction—the decision below has far less legal or practical significance than petitioners suggest. Indeed, the Fourth Circuit carefully avoided precisely the kinds of broad-brush pronouncements that petitioners seek to attribute to it in their efforts to magnify the importance of this case. Petitioners' dire warnings that the decision below "hobbles" or "cripples" states' efforts to support new generation therefore fall flat. CPV-Pet.18, State-Pet.1.

According to petitioners, the decision below rests on the faulty premise that the PJM market must be the "exclusive source of 'incentives' for constructing power plants." CPV-Pet.30. But in fact, the Fourth Circuit emphasized that states have plenty of avenues for incentivizing new generation; they just may not alter the incentives that *the PJM market produces* by

---

[4] That is particularly so given that the Maryland's actions here are invalid for the additional reason that they violate the dormant Commerce Clause. *See* Appellees' Br.49-58, *PPL EnergyPlus, LLC v. Solomon*, No. 13-4330 (3d Cir. Feb. 18, 2014); Appellees' Br.51-60 (Doc. 65). While the Fourth Circuit had no need to reach that issue in light of its holding that the Act was preempted, Pet.App.25a n.3, that remains an alternative basis for affirming the District Court's injunction.

establishing different and more stable price guarantees for sales *in that market* (particularly when FERC has already rejected that approach). In reaching that conclusion, the court explicitly disclaimed any attempt to "express an opinion on other state efforts to encourage new generation ... that may or may not differ in important ways from the Maryland initiative." Pet.App.21a. Likewise, the court made a point of reiterating that "not 'every state statute that has some indirect effect' on wholesale rates is preempted," and that "not every state regulation that incidentally affects federal markets is preempted." Pet.App.21a, 24a-25a.

Indeed, although petitioners continue to largely ignore them, there is no question that states retain numerous other means of incentivizing generation. For instance, Maryland could have procured capacity outside of the PJM auction through FERC's fixed resource requirement option, which allows distributors to do so through true bilateral contracts (*i.e.*, contracts between two parties for the actual sale of electricity) or by constructing their own generation facilities. It could have established an agency to build state-owned power plants and sell directly to Maryland's retail consumers. It could have bypassed the wholesale market altogether and returned to the vertically integrated regime that many states still retain. In fact, the PSC expressly recognized that a return to vertical integration would enable Maryland to regain complete control over regulatory decisions, yet nonetheless opted not to pursue that path. Nothing in the decision below casts doubt on the continued validity of those alternatives—let alone

"creates a regulatory vacuum for generation planning and development." State-Pet.26.

Nor is there any merit to petitioners' contention that the decision below somehow jeopardizes a whole laundry list of other state incentive schemes. *See* State-Pet.22-25; CPV-Pet.32-34. Petitioners conspicuously fail to identify a single one of these programs (other than New Jersey's materially analogous one) that has been invalidated. Moreover, for the most part, the programs they invoke involve different factual circumstances, such as contracts for electricity or capacity sales *outside* of an RTO's market mechanism. In any event, whether the lower courts will confine the decision below to this specific scheme or construe it to have implications for other factual scenarios remains to be seen. For this Court to wade into those issues now therefore would be premature—particularly when every single federal judge to consider *this* specific scheme has agreed that the preemption problem could not be clearer.

Petitioners fare no better with their suggestion that the particular incentive scheme at issue here is critical to the development of new generating facilities. That suggestion is belied by the numerous other options state retain and the paucity of states that have insisted on attempting anything like this. It also is belied by the developments in this very case: After insisting that it would not and could not build a new generating facility without the fixed revenue stream that the pricing contracts guarantee, CPV proceeded with its plans to build the very same plant at issue here, even though those contracts were

invalidated. *See* Jeff Newman, *CPV breaks ground on gas plant*, Gazette.Net (Dec. 3, 2014).

In short, as the Fourth Circuit correctly recognized, this case is not about whether states retain power to regulate or incentivize generating facilities. Of course they do. This case is instead about the much narrower question of whether states may incentivize generation by setting their own rates for wholesale transactions. Even petitioners concede that they may not. In doing so, they effectively concede that this case is ultimately about an even narrower question—namely, whether the particular state scheme at issue here does in fact set the rate that CPV "receive[s] ... for or in connection with" its sales of energy and capacity to PJM. 16 U.S.C. §824d(a). As both courts below recognized, there can be no serious dispute that it does. That factbound, splitless, and manifestly correct conclusion by four federal courts and eight judges on what really amounts to a question of fact does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for certiorari.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
CANDICE C. WONG
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com
Counsel for Respondents

TAMARA LINDE
Executive Vice President and General Counsel
PSEG SERVICES CORP
80 Park Plaza
Newark, NJ 07102

SHANNEN W. COFFIN
STEPTOE & JOHNSON LLP
1330 Connecticut Ave. NW
Washington, DC 20036
Counsel for PSEG Power, LLC

JESSE A. DILLON
Assistant General Counsel
PPL SERVICES CORP.
Two N. Ninth Street
Allentown, PA 18101

DAVID L. MEYER
MORRISON & FOERSTER
2000 Pennsylvania Ave. NW
Suite 6000
Washington, DC 20006
Counsel for The PPL Companies

DAVID MUSSELMAN
Associate General Counsel
ESSENTIAL POWER, LLC
150 College Road West
Princeton, NJ 08540
Counsel for Essential Power, LLC

February 11, 2015